for his involvement in the BMF affair, the plaintiffs had reason to believe that if Lorrain had left Malaysia on November 8, 1984, he did so in order to evade service.

If Lorrain left the country on November 8, 1984, he must have left in secrecy. He told the Ahmad Noordin Committee that his place of contact was the office of Aspatra Sdn. Bhd. in Wisma Stephens. Yet when Mr. Lee Kim Cheng, the clerk working in the firm of the plaintiffs' solicitors, went to the office on January 11, 1985 no one in the office knew where he was. In his affidavit, Mr. Lee said:

"On arrival at the defendant's office known as Aspatra Sdn. Bhd. which is situated at 14th Floor, Wisma Stephen, Kuala Lumpur, I enquired for the Defendant and was told by one Shamsul Kamariah binti Yahya, who claimed to be the Defendant's secretary, that the Defendant was not in. I asked her whether she was aware if the Defendant would be coming to the office on that day and her reply was 'the Defendant had not come to the office for quite sometime and that she does not know whether the Defendant would be coming to the office or not.' "

Sonni Pillai, in his affidavit in support of the application stated that Lorrain left this country and now lives at a fixed residential address in a foreign country. He did not name the country. He claimed to know Lorrain's address and telephone number in that foreign country but he could not divulge this information on the ground that the information is privileged between solicitor and client.

According to Sonni Pillai's affidavit, Lorrain left this country because of fears for his life and personal safety and that of his wife and child, on account of numerous death threats and threats of physical violence which had been made against him. Yet, in the same affidavit Sonni Pillai said that Lorrain intended to return for the trial of this action, which he would be contesting fully. If Lorrain intended to contest the action against him, why did he not enter appearance and file his defence instead of only entering conditional appearance? If he is seriously contesting the suit why did he not personally affirm an affidavit in support of the present application. It seems to me he wants to maintain the secrecy of his present whereabouts. If he affirmed an affidavit in a foreign country he is required, under Order 41 rule 1(4) of the Rules of the High Court, to state the place of his residence. Furthermore, the affidavit will show the place where he affirmed it. It is clear that Lorrain does not want to disclose where he is now. That is why he asked Sonni Pillai and the two other persons to affirm the affidavits in support of his application.

Again, if he is serious in contesting the suit, why did he not instruct his solicitors to accept service on his behalf. Mr. Fernandez told the Court that he had no instruction from his client to accept service. The solicitors for the plaintiffs wrote to Lorrain's previous solicitors and present solicitors informing them that the plaintiffs would not rely on the order of substituted service provided that the solicitors agreed to accept service on behalf of Lorrain. The offer had not been accepted. The plaintiffs contended that this was a lack of good faith on the part of Lorrain.

From the evidence stated above I am fully satisfied that, if Lorrain had left the country on November 8, 1984 and was out of jurisdiction when the writ was issued, he did so in order to avoid service of the writ.

In the circumstances, I dismiss the application with costs. Lorrain will have to file his defence within twenty-one days from today.

Application dismissed.

Solicitors: *Skrine & Co.; Fernandez & Co.*

SEASIANA SDN. BHD. v. SAAB SCANIA AB & ANOR.

[O.C.J. (Zakaria Yatim J.) September 16, 1985]

[Kuala Lumpur – Civil Suit No. C3039 of 1985]

Practice and Procedure – Writ – Defendants residing abroad – Writ issued without leave of Court to serve out of jurisdiction – R.H.C. 1980, O.6 r. 6(1) & O.11.

The defendants applied for an order that the writ of summons on/or service of the writ of summons on the 1st and 2nd defendants be set aside for non-compliance with R.H.C. 1980, O.6 r.6.

The writ in question was filed by the plaintiffs on June 7, 1985 and both the defendants' addresses were given as out of the jurisdiction of the court. The plaintiffs averred that the first defendant had appointed them as Saab Car franchise holder for the whole of Malaysia through the 2nd defendant. The plaintiffs alleged that, subsequently to such appointment, the defendants, in breach of the agreement between the parties, revoked the appointment. The plaintiffs filed an *ex parte* application for an injunction and such injunction was granted on June 13, 1985 restraining both

the defendants, their agents or servants from appointing a Saab Car franchise in Malaysia until the trial of the action.

At the hearing of the application to set aside the writ on July 17, 1985 neither the plaintiffs nor their counsel was present. Counsel for the applicants submitted that since both defendants were resident abroad, it was necessary that there should be a writ issued out of jurisdiction. The counsel averred that the writ was issued without the leave of the court and he contended that the plaintiffs had not made any application under Order 6 or Order 11.

He also pointed out that the plaintiffs had failed to comply with Practice Direction No. 2 of 1982.

Held: (1) it was clear that under Order 6 Rule 6, no writ, notice of which is to be served out of jurisdiction, should be issued without leave of the court. Order 11 also provided that service of a notice of a writ out of jurisdiction was only allowed with the leave of the court. The Practice Direction clearly provided the procedure for asking the leave of court for the issue of writ for service out of jurisdiction. In the present case, the plaintiffs had failed to comply with Order 6 rule 6 and Practice Direction No. 2 of 1982.

Case referred to:

(1) *In re "N" (Infants)* [1967] 1 Ch. 512, 528.

CIVIL SUIT.

Plaintiff absent.
Cecil Abraham for the defendants.

Cur. Adv. Vult.

Zakaria Yatim J. : This was an application by the first and second defendants for an order that the writ of summons on/or service of the writ of summons on the first and second defendants be set aside for non-compliance with Order 6 rule 6 of the Rules of the High Court, 1980.

The writ was filed by the plaintiffs on June 7, 1985. In the writ, the address of the first defendant was given as Saab Car Division S-61 81, Nykoping, Sweden and the address of the second defendant as 6-11-9 Roppongi, Minato-Ku, Tokyo 106, Japan. In their statement of claim, the plaintiffs averred that the first defendant appointed them as the Saab Car franchise holder for the whole of Malaysia through the second defendant. The plaintiffs alleged that, subsequent to such appointment, the defendants, in breach of the agreement between the parties, revoked the appointment.

On June 11, 1985, the plaintiffs filed an *ex parte* application for an injunction. On June 13, 1985, an injunction was granted restraining both the defendants, their agents or servants from appointing a Saab car franchise in Malaysia until the trial of the action.

The hearing of the application to set aside the writ was on June 17, 1985. At the hearing, neither the plaintiffs nor their counsel was present. The plaintiffs' counsel, Mr. Anthony John Dason, however filed an affidavit dated July 12, 1985. I proceeded to hear the application in the absence of the plaintiffs or their counsel.

Mr. Cecil Abraham, counsel for both the defendants, submitted that since both defendants were resident abroad, it was necessary that there should be a writ issued for service out of jurisdiction. In his affidavit in support of the application, Mr. Abraham averred that the writ was issued without the leave of the Court. According to him the plaintiffs had not made any application under Order 6 or Order 11. He added that the plaintiffs had failed to comply with Practice Direction No. 2 of 1982. Mr. Dason, in his affidavit, averred that the plaintiffs never attempted to avoid the necessity of obtaining a Court order, as required by Order 11 nor did the plaintiffs breach Order 6 rule 6.

I fully agree with Mr. Abraham's submission. Order 6 rule 6 (1) clearly states that no writ, notice of which is to be served out of jurisdiction, shall be issued without the leave of the Court. Order 11 also states that service of a notice of a writ out of jurisdiction is only allowed with the leave of the Court. The Practice Direction clearly provides the procedure for asking the leave of the Court for the issue of writ for service out of jurisdiction. In the present case, the plaintiffs have failed to comply with Order 6 rule 6 of the Rules of the High Court and Practice Direction No. 2 of 1982.

It would have been possible for the plaintiffs, at the time of the application for the injunction, to ask the Court to grant the injunction on their undertaking to comply with Order 6 and Order 11, where the case was one of urgency. See Order 29 rule 1(3). See also *In re "N" (Infants).*[1] But no such undertaking was made at the time of the *ex parte* application. Accordingly, the injunction granted on June 13, 1985 should be set aside.

For the reasons stated above, I made the following order:

(1) The writ of summons was set aside.

(2) The injunction granted on June 13, 1985 was set aside.

(3) Costs to the defendants in any event.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Dason & Co.*

PUBLIC PROSECUTOR v. MUTHU LINGAM

[A.C.J. (Chan J.) October 2, 1985]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 1 of 1984]

Criminal Law and Procedure – Criminal breach of trust by agent – Sentence – Penal Code (F.M.S. Cap. 45), s. 490.

In this case the respondent who was a sales representative of a company was given the sum of $100,000 by the complainant so that he could open an account with the company in her name. Instead the respondent paid the money into his own savings account with the Hongkong and Shanghai Bank. It was only eight days later that the respondent put the money into the clients' account of the company after the complainant had discovered that the money had not been paid into her trading account with the company. The respondent was charged for the offence of criminal breach of trust by an agent acting as such under section 409 of the Penal Code. He was convicted and sentenced to a day's imprisonment and fined $3000 in default six months. The Public Prosecutor appealed against the inadequacy of the sentence.

Held: (1) the two factors which operate in a case of this kind are retribution and deterrence. Public interest demands that crimes of this sort must be punished severely and discouraged;

(2) the sentence of 1 day's imprisonment should be enhanced to three years. The fine is to remain.

Cases referred to:

(1) *R.* v. *Davies* (1978) 67 Cr. App R 207, 210.
(2) *R.* v. *Pugh and Rendell* [1981] Crim. L.R. 270.
(3) *Public Prosecutor* v. *Khairuddin* [1982] 1 M.L.J. 331.

CRIMINAL APPEAL.

Tan Hock Chuan (Deputy Public Prosecutor) for the appellant.

Karpal Singh for the respondent.

Cur. Adv. Vult.

Chan J. : Muthu Lingam was a sales representative of Wengkal Sdn. Bhd. Wengkal is a firm which trades in commodities. On November 12, 1981 Tan Sri Haji Mohd. Noah bin Omar gave his wife, Puan Sri Siti Amirah bt. Parawira Kasuma, a cash cheque for $100,000 so that she could use the money to trade in commodities with Wengkal. The money was given in the office of Tan Sri Haji Noah. Muthu Lingam was there. Puan Sri Siti Amirah and Muthu Lingam then went to the United Malayan Banking Corporation branch office at Jalan Tun Perak to cash the cheque. She gave the money to Muthu Lingam so that he could open an account with Wengkal in her name. Instead, Muthu Lingam paid the money into his own savings account with the Hongkong and Shanghai Bank branch office at Jalan Bukit Bintang. By so doing, he has committed the offence of criminal breach of trust by an agent acting as such under section 409 of the Penal Code. The money was eventually put into the clients' account of Wengkal but this was not done until some eight days later – on November 20, 1981. The money was only put into Puan Sri Siti Amirah's account after she had discovered that the $100,000 was not paid into her trading account with Wengkal. It was only after the discovery that Muthu Lingam, on November 20, 1981, caused an account to be opened for Puan Sri Siti Amirah as a new client of Wengkal.

Subsequently, he was charged before the Sessions Court at Kuala Lumpur for the offence of criminal breach of trust by an agent acting as such under section 409 of the Penal Code. He was convicted on January 3, 1984 and sentenced to a day's imprisonment and fined $3,000 in default six months' imprisonment. It is against the inadequacy of the length of the custodial sentence that the Public Prosecutor is now appealing.

What then is the right sentencing policy for this type of crime? "A good deal depends upon the concept of what is necessary." – said Lawton L.J. in *R.* v. *Davies.*[1] He said:

> "There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation. ... At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion I think, is not held as strongly now as it was a few years ago. The reason is manifest: the courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community of particular types of criminal conduct."

The retributive element is an important one in the present case.

One shudders to think of what might have happened to the money had Puan Sri Siti Amirah not become suspicious. In *R.* v. *Pugh and Rendell,*[2] it was held that "dishonesty by persons